

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re C. H. et al., Persons Coming Under the  
Juvenile Court Law.

STANISLAUS COUNTY  
COMMUNITY SERVICES AGENCY,

Plaintiff and Respondent,

v.

JESSICA H.,

Defendant and Appellant.

F070958

(Super. Ct. Nos. 516756, 516757  
and 516969)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q.  
Ameral, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant  
and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County  
Counsel, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Gomes, Acting P. J., Detjen, J. and Smith, J.

Appellant Jessica H. appeals from the termination of her parental rights as to her three-year-old son C., two-year-old son A. and one-year-old daughter N.<sup>1</sup> On appeal, she contends the juvenile court erred in denying her Welfare and Institutions Code section 388 petition (hereafter section 388 petition)<sup>2</sup> and in not applying the “beneficial parental relationship exception” to adoption (§ 366.26, subd. (c)(1)(B)(i)).<sup>3</sup> We conclude both contentions lack merit and we affirm the orders.

### **PROCEDURAL AND FACTUAL SUMMARY**

In August 2013, the Stanislaus County Community Services Agency (agency) took then two-year-old C. and seven-month-old A. into protective custody after receiving reports that they were living in squalid conditions and that A. was weak and unable to extend his arms and legs. The agency believed based on its long relationship with Jessica that drug use, mental illness and domestic violence factored into her inability to properly care for the children. The agency also learned that Jessica left the children in the care of Aaron G., her husband and the children’s father was a registered sex offender and prohibited from being around the children. Father was taken into custody and the children were placed in foster care.

---

<sup>1</sup> The children’s father, Aaron G. is not a party to this appeal.

<sup>2</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>3</sup> Appellate counsel has brought to this court’s attention that the notice of appeal filed on February 17, 2015, appeals from the January 30, 2015 order terminating parental rights with no mention of the order issued the same date denying the section 388 petition. Appellate counsel asks that we amend the notice of appeal to include the order denying the section 388 petition. As we stated in *In re Madison W.* (2006) 141 Cal.App.4th 1447, 1451 “[W]e ... liberally construe a parent’s notice of appeal from an order terminating parental rights to encompass the denial of the parent’s section 388 petition, provided the trial court issued its denial during the 60-day period prior to filing the parent’s notice of appeal.” We so construe Jessica’s notice of appeal and consider both orders on their merit.

The juvenile court ordered the children detained and the agency referred Jessica for services including a drug and alcohol assessment, domestic violence and individual counseling and parenting classes.

In late August 2013, Jessica completed the drug and alcohol assessment and was referred to Stanislaus Recovery Center for detoxification which she completed. Around this time, Jessica discovered she and father were expecting another child. She began attending group meetings while on a waiting list for outpatient treatment at First Step Perinatal Drug & Alcohol Treatment Program (First Step) and calling Redwood Family Center (Redwood) for admittance into their sober living facility.

The agency advised the juvenile court that Jessica was willing to engage in services but became easily overwhelmed and was prone to anger and resistance when she was confused. Her social worker believed she would need services for a “considerable time” and emphasized Jessica’s need to initiate services promptly. The agency did not recommend reunification services for father based on his sex offender status. (§ 361.5, subd. (b)(16).)

In October 2013, the juvenile court took jurisdiction over the children, ordered reunification services for Jessica but denied services for father. The court set the six-month review hearing for March 2014.

In December 2013, Jessica tested positive for methamphetamine and was admitted for residential treatment at Nirvana Drug and Alcohol Treatment Program (Nirvana). In late January 2014 while a resident of Nirvana, Jessica delivered N. by cesarean section (C-section). Jessica was unable to have N. with her at Nirvana and consented to having N. placed in protective custody.

In February 2014, the juvenile court ordered N. detained and the agency placed her with her brothers in foster care. That same month, the agency received a progress report that Jessica continued to test negative for drugs and was on track with her treatment plan. She was expected to complete her program in early March and transition

to Redwood and First Step for day treatment. Her counselor also reported that father attempted to see Jessica at the hospital when N. was born but was turned away.

In mid-February 2014, N. was admitted to Valley Children's Hospital in Madera for pertussis and placed on life support. Jessica was allowed to leave Nirvana to stay at the Ronald McDonald House to be near her.

In its six-month review hearing, the agency reported that Jessica had done very well in addressing her drug abuse and separating from father. She was testing negative for drugs, filed for divorce and had obtained a restraining order against him. However, she had not completed the other components of her case plan because she was recovering from her C-section and attending to N. at the hospital. Given Jessica's progress with her drug abuse, the agency believed Jessica could complete her services if given additional time and recommended the juvenile court continue her services until the 12-month review hearing.

After the agency completed its report, social worker Diana Caradonna was informed by the program director at Nirvana that Jessica had been gone for four or five days. Jessica initially denied not being at the Ronald McDonald House and using methamphetamine. When pressed, she said she was "stuck in Modesto" for a few days and used methamphetamine.

In March 2014, the juvenile court conducted a dispositional hearing as to N. and a six-month review hearing as to C. and A. The juvenile court declared N. a dependent, removed her from parental custody and granted Jessica six months of reunification services. The juvenile court found that father's whereabouts were unknown and denied him reunification services. As to C. and A., the juvenile court found that Jessica's progress was "fair" and that there was a likelihood the boys could be returned to her by the 12-month review hearing which it set for September 2014.

Following the hearing, Caradonna arranged for Jessica to have another alcohol and drug assessment during which Jessica admitted to relapsing on methamphetamine.

Jessica denied however using after being “caught.” Caradonna believed Jessica was minimizing her relapse and trying to avoid going back to Nirvana. She arranged for Jessica to pick up her belongings at the Ronald McDonald House and return to Nirvana.

Approximately a week later, Caradonna was informed that Jessica left Nirvana after walking out of a meeting to discuss her relapse. The substance abuse specialist said Jessica was told she could either “get honest or pack her bags.” Jessica chose to leave. The specialist said that Jessica did not appear to have achieved any recovery after all her time there and was heard laughing about her relapse in group session.

The next day, Caradonna tested Jessica and she tested negative for drugs. Caradonna required Jessica to attend a Narcotics/Alcoholics Anonymous (NA/AA) meeting daily for the next three weeks before she would refer her for drug treatment. Jessica succeeded in doing so however was asked to drug test several times but did not, making various excuses. When asked if she was using drugs, she said she needed to get back into treatment. She said she did not use “a lot” and used alone.

In April 2014, N. was discharged from the hospital and placed with her brothers.

In early June 2014, Jessica was admitted to Nirvana for residential treatment. She tested positive for methamphetamine at the time of her admission. According to the staff, Jessica’s attitude and demeanor had greatly improved and she was engaging in services. She also regularly visited the children once a week for two hours. She interacted appropriately with them and did her best to attend to all three children. However, on several occasions while visiting the children at the agency facilities, the staff noticed Jessica had difficulty caring for all three children at the same time.

In July 2014, Jessica successfully completed residential treatment at Nirvana and entered their day treatment program. However, the agency was concerned that she maintained contact with father. Consequently, Caradonna checked Jessica and father’s Facebook pages. In two separate postings in August, father stated that he missed Jessica

and the children and had fun with Jessica the day before. He said they were both excited to see each other. In the other post father stated that Jessica called him and wanted him to go with her to the hospital to see her grandfather. Jessica adamantly denied having any contact with father. She said she went to see her grandfather in the hospital but father was not there. She believed he heard about her grandfather through her family's Facebook page.

In mid-August Caradonna received a progress report from Tracey McCullough, Nirvana's program director, stating that Jessica was attending group sessions, working with her sponsor and testing negative for drugs. Jessica was tentatively scheduled to complete day treatment in early September 2014 and transition to First Step for outpatient services. McCullough noted that Jessica was complacent at times and appeared to be going through the motions.

By the end of September 2014, Jessica had been in treatment at First Step for approximately a month. According to the program director, she was compliant with the program standards, had an excellent attitude and tested negative for drugs. She also completed eight of the required eight parenting group sessions, was attentive to group topics, completed her assignments and was receptive to suggestions and feedback.

Jessica was also participating in domestic violence and individual counseling through Sierra Vista Child and Family Services. Jessica appeared motivated and open to counseling since she returned to services in July 2014. She was able to identify the characteristics of a batterer and how children are affected by domestic violence and discussed how she could make better life choices. Her counselor believed she could make further progress if she continued to attend counseling consistently and comply with the program requirements.

Jessica was also reportedly doing well at Redwood. According to the program manager, she attended the required NA/AA meetings, met weekly with her sponsor, participated in drug treatment and tested negative for drugs. In addition, she was

attentive to the children during their monitored visits, appropriately disciplined them and never left them unattended.

In October 2014, the juvenile court conducted a contested six-month review hearing as to N. and 12-month review hearing as to C. and A. The agency's recommendation going into the hearing was to terminate Jessica's reunification services as to all three children because Jessica had not made sufficient progress toward meeting her case plan objectives and did not appear able to do so in the time remaining. The agency was particularly concerned about the possibility Jessica was going through the motions of treatment given her failure to seek out support after she relapsed and her resistance to continue treatment. The agency was also concerned that Jessica had difficulty maintaining healthy boundaries in her personal relationships and at times struggled to manage all three children without assistance during visitation.

Jessica was the sole witness at the contested hearing. She testified that she was 24 years old and first used methamphetamine when she was 16. She last used the drug in June 2014, the day she entered Nirvana. Prior to that, she was using methamphetamine almost daily. She was still receiving treatment at First Step, working on step three of the 12-step program and had a sponsor. She was participating in but had not completed parenting classes and individual and domestic violence counseling.

Jessica testified she last saw father in June 2014 before she went into treatment. She was at a park near her aunt's house and he approached her. She walked away from him and had not seen him since. She denied having any contact with him on Facebook.

At the conclusion of the hearing, the juvenile court found it would be detrimental to return the children to Jessica's custody. It also found that Jessica had not participated regularly and made substantive progress in her services plan and that there was not a substantial probability the children could be returned to her within the statutory timeframe. The court commented that Jessica needed more parenting and that her recovery was too recent to safely return the children to her. The court terminated her

reunification services and set a section 366.26 hearing for January 30, 2015. The court also ordered that the children be made available for a bonding study.

Jessica challenged the juvenile court's setting order by writ petition which we denied (F070238).

On January 9, 2015, Jessica's attorney filed a section 388 petition on her behalf asking the juvenile court to reinstate her reunification services. She claimed her circumstances had changed since the court terminated her services in that she had been clean and sober for eight months, completed anger management and continued to participate in parenting classes, domestic violence groups, NA/AA meetings and outpatient treatment at Redwood where she was a "model client." She also claimed that she maintained regular contact with the children and that they were very bonded to her.

The juvenile court set the hearing on Jessica's section 388 petition to be heard on January 30, 2015 together with the section 366.26 hearing.

In its report for the section 366.26 hearing, the agency recommended the juvenile court terminate Jessica's parental rights as to all three children and pursue adoption as their permanent plan. The children had been with their foster parents from a very young age and for a significant period of time; C. and A. for over a year from the ages of two years and 11 months-old respectively and N. since birth. The children were strongly bonded to their foster parents and the foster parents loved the children and wanted to adopt them.

On January 30, 2015, the juvenile court convened the contested hearing and addressed the section 388 petition first. Jessica's attorney submitted several updated exhibits. Exhibits 1 and 2 are letters from First Step, indicating Jessica advanced to phase II of the three-phase parenting and outpatient substance abuse programs. Jessica was meeting all program requirements, including participating in weekly parenting classes, consistently testing negative for all substances of abuse, attending NA/AA meetings and meeting with her sponsor. In addition, she was working on step five of the



12-step program. Exhibit 3 is a letter from the program manager at Haven Women's Center, attesting to Jessica's completion of anger management groups and near completion of domestic violence groups. She needed to attend five more weekly group sessions to receive a certificate of completion.

Jessica's attorney also made an offer of proof that Jessica could care for the children at Redwood and that it would be detrimental to them to sever their bond with her. Counsel accepted her offer of proof.

Following argument on the section 388 petition the juvenile court found that Jessica had demonstrated changing circumstances but not changed circumstances, given her lengthy history of substance abuse. The court noted that First Step is a one-year program and given Jessica's rate of progress she would not complete the program until sometime during the summer of 2015. The court also found that granting the petition would not be in the children's best interests given the quality of their visits with Jessica.

The juvenile court proceeded to the section 366.26 phase of the hearing. Jessica's attorney requested a continuance, stating she had arranged for a bonding study with Dr. Cheryl Carmichael. However, Dr. Carmichael declined to write a report, stating she met with Jessica and the children and she did not believe the children would benefit by maintaining a relationship with Jessica. Jessica's attorney requested a continuance to seek a second bonding study. The court denied the request.

Jessica's attorney called her to testify. She testified the children were closely bonded to her. She said that C. called her "Mommy No. 1" and was happy to see her at the beginning of visits. He hugged and kissed her and told her he loved her. She said A. could not talk but displayed his excitement to see her by clapping. N. kicked her feet and giggled. She said she played ball with the boys and with a rattle with N. She said A. was usually tired at the end of a visit. She hugged and kissed him and put him in the stroller. N. held onto her and did not want to let go.

Jessica also testified she believed it would be harmful to the children to sever her parental rights because they knew and loved her and when they saw her they got very excited. C. told her he would see her later, indicating he expected to see her again.

At the conclusion of the hearing, the juvenile court terminated Jessica and Aaron's parental rights, finding that it was very likely the children would be adopted and adoption would not be detrimental to them.

This appeal ensued.

## **DISCUSSION**

### **I. Section 388 petition**

Jessica contends the juvenile court abused its discretion in denying her section 388 petition. We disagree.

A petition to modify a juvenile court order under section 388 must allege facts showing that new evidence or changed circumstances exist, and that changing the order will serve the child's best interests. (§ 388, subd. (a).) The petitioner has the burden of proof by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(C).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1529 (*I.W.*).)

The best interests of the child are of paramount consideration when, as here, a section 388 petition is brought *after* termination of reunification services. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A

petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*)). "[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

The "escape mechanism" provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Here, the juvenile court found that although Jessica's circumstances were changing, they had not yet changed. At the time of the contested hearing, Jessica had been in recovery for approximately eight months. She still had five to seven months of outpatient substance abuse treatment to complete the program and was on step four of 12 steps. While she had made commendable progress toward recovery, it was far from significant given her lengthy history of drug abuse. Further, there was no indication that she was currently able to parent the children. Nor was there any indication that reopening reunification was in the children's best interest.

C. and A. were removed in August 2013 at the ages of two years and seven months respectively. By January 2015, they had spent over a year in the care of their

foster parents and were strongly bonded to them. N. had spent her entire life in her foster parents' care and knew no other parents.

Given these circumstances, the juvenile court's finding of "changing," as opposed to "changed" circumstances in light of Jessica's relatively brief recovery and the children's tender ages was well within the court's discretion.

## **II. Beneficial Parental Relationship Exception**

Jessica contends the juvenile court erred in not applying the beneficial parental relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i).) We disagree.

Section 366.26 governs the proceedings at which the juvenile court must select a permanent placement for a child adjudged its dependent. If the court determines it is likely the child will be adopted, the statute requires the court to terminate parental rights. (§ 366.26, subd. (c)(1).) The court's prior findings that it would be detrimental to return the child to parental custody and its order terminating reunification services constitute a sufficient basis for terminating parental rights unless the court finds that one of the six exceptions specified in subdivision (c)(1)(B) would render termination of parental rights detrimental to the child. The party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions has the burden of producing that evidence. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

At the section 366.26 hearing, Jessica's attorney argued that terminating Jessica's parental rights would be detrimental to the children thus invoking the beneficial relationship exception which states: "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

When a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim but whether the juvenile court abused its discretion in so doing. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) For this to occur, the proof offered

would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*I.W., supra*, 180 Cal.App.4th at p. 1528.)

In this case, there is no dispute that Jessica maintained regular visitation and contact with the children. The question is whether the evidence compelled a finding that the children would benefit from continuing their relationship with Jessica as a matter of law. “To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child.” (*I.W., supra*, 180 Cal.App.4th at p. 1527.)

Although the children were happy to see Jessica and were loving toward her, Jessica did not present *any* evidence establishing a benefit to them from continuing the relationship, and we see none. Rather, the evidence points to the conclusion that Jessica struggled to parent the children whereas their foster parents were able to meet their needs in a safe and secure home. We conclude the juvenile court did not abuse its discretion by finding that the beneficial parental exception to adoption did not apply.

### **DISPOSITION**

The orders denying the section 388 petition and terminating parental rights are affirmed.